No. 01-46

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether constitutional principles of state sovereign immunity preclude the Federal Maritime Commission from adjudicating a private party cause of action against a state agency for an alleged violation of the Shipping Act of 1984.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States. *Amici* have a compelling interest in protecting the States' sovereign prerogatives.[1]

The Court has long recognized that "each State is a sovereign entity in our federal system" and that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (quotations and citations omitted). The Court has also repeatedly reaffirmed that "Congress may not . . . base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I." *See, e.g., Board of Trustees of the Univ. of Ala. v. Garrett*, 121 S.Ct. 955, 962 (2001). The Court has further made clear that the States' constitutional immunity from litigation initiated by private parties is not limited to the category of cases specifically referred to in the text of the Eleventh Amendment. *See, e.g., Alden v. Maine*, 527 U.S. 706, 730 (1999).

Notwithstanding these fundamental principles, the Federal Maritime Commission, a federal administrative agency, asserts that it has power to adjudicate a cause of action brought by a private party against a State, in which the complainant has resource to a full range of coercive process and in which the Commission asserts the power to award monetary relief, because in its view, the States have sovereign immunity only in judicial forums. The court of appeals properly rejected this sweeping expansion of federal power which would effectively eviscerate this Court's holding in

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution towards its preparation or submission.

Seminole Tribe. As that court recognized—and the United States has itself frequently contended—the core concerns of sovereign immunity are as much offended by administrative litigation that is initiated and conducted by a private party as they are by a suit filed in a federal or state court.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

1. The Court has long recognized that the principle of state sovereign immunity derives from the structure and design of the Constitution. The Constitution recognizes that the States are sovereign entities that retain substantial powers with the dignity inhering in that status and rejects "the concept of a central government that would act upon and through the States." *Alden v. Maine*, 527 U.S. 706, 714 (1999) (internal quotations and citations omitted). The Court has thus repeatedly held that the scope of the States' constitutional immunity from suit is not limited by the literal terms of the Eleventh Amendment and preserves the States' traditionally immunity from suit except where there is compelling evidence that the States surrendered their immunity as part of the constitutional plan. This immunity protects the States from "the indignity" of being subjected "to the coercive process of judicial tribunals at the instance of private parties," *In re Ayers*, 123 U.S. 443, 505 (1887), as well as their fiscal integrity. The immunity's protections are violated whenever a State is forced into litigation by private parties, "regardless of the forum." *Alden*, 527 U.S. at 749.

2. Notwithstanding that the Federal Maritime Commission has substantial powers to obtain a State's compliance with federal law, the Commission asserts the power to adjudicate a private complaint proceeding brought against a State which seeks, *inter alia*, monetary relief. In support of this sweeping

expansion of federal power, the Commission and the United States contend that the protections of sovereign immunity are limited to those disputes which are litigated in judicial tribunals. The United States' contention, however, is belied by its own frequent assertions of sovereign immunity in administrative proceedings. Moreover, the Commission's and the United States' attempt to limit the scope of the States' constitutional immunity to the proceedings described in the text of the Eleventh Amendment has been repeatedly rejected by this Court as "ahistorical literalism." *Alden*, 527 U.S. at 730. As the Court has explained, "the bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit." *Id*. at 736. In any event, the word "suit" is a generic term which encompasses administrative litigation. *See Franchise Tax Bd. of Cal. v. United States Postal Serv.*, 467 U.S. 512, 523-25 (1984).

3. The Shipping Act and the Commission's regulations make clear that a private complaint proceeding is a lawsuit for all intents and purposes. The claim is itself called a "cause of action," provides for the recovery of damages, interest and attorney's fees, and is subject to a three year statute of limitations. 46 U.S.C. App. § 1710(g). Moreover, under the Commission's rules—which frequently borrow verbatim from the Federal Rules of Civil Procedure—the case is litigated in the same manner as any other lawsuit. The case is assigned to an ALJ, who is required to be free from political influence and who is given broad powers over the parties and the case. The Commission's rules provide a litigant with a wide range of coercive process including the power to take depositions and request the production of documents, and provide substantial sanctions for failure to comply with discovery orders.

Upon the close of the evidence, the parties submit briefs with proposed findings and legal argument accompanied by citations of authorities. The ALJ is required to issue a decision complete with findings and conclusions of law on

the material issues and an appropriate ruling on the prayer for relief. Thus contrary to the Commission's assertion, FMC Br. 24, the proceeding has no semblance to an investigation but rather bears almost every attribute of litigation conducted in a federal district court.

4. The United States and the Commission overlook the fact that the purpose of the proceeding is to impose monetary liability on the state respondent and that the complainant is given authority under the rules to invoke a full range of coercive process. Instead, they contend that because the Commission lacks the contempt power and thus cannot enforce its own orders the proceeding is less of an affront to the State's dignitary interests or a threat to its fiscal integrity.

Sovereign immunity, however, has always been understood as barring litigation of a claim even if a court lacks the power to award an enforceable judgment. Moreover, no court has ever held that the United States is barred from raising a sovereign immunity defense in an administrative proceeding because an ALJ's order can only be enforced by a federal court. Furthermore, Congress has granted the Commission power to assess a civil penalty of up to "$25,000 for each violation" of a Commission order, with "[e]ach day of a continuing violation constitut[ing] a separate offense." 46 U.S.C. App. § 1712(a). Unlike a reparations order which can only be enforced by the complainant, the United States can seek enforcement of a civil penalty order in federal court. Thus, while the Commission cannot levy directly on the State's property, it can subject the State to substantial monetary penalties if it does not comply with a reparations order. A State thus faces the Hobson's choice of paying either reparations or civil penalties which accumulate on a daily basis. It is thus error to suggest that the FMC's adjudication of liability "does not pose the same threat to the State's financial integrity as a comparable exercise of jurisdiction by a federal court." U.S. Br. 21.

That the litigation occurs in an Article II agency, which unlike a federal court has a program interest in administering a statutory scheme, actually buttresses the State's claim to immunity. An administrative agency is given broad discretion to "adapt [its] rules and policies to the demands of changing circumstances." *Rust v. Sullivan*, 500 U.S. 173, 187 (1991) (other citations and quotations omitted). The Commission is thus not bound to follow its own precedents in an adjudication in the way a district court is required to adhere to case law under principles of *stare decisis*. While civil litigation in the courts can raise the possibility of unpredictable retroactive liability, the Commission's assertion of jurisdiction over privately prosecuted complaints seeking reparations raises a much greater risk of unforeseen monetary liability. The need for sovereign immunity is thus greater in federal agency adjudication than it is in the courts. And it is simply illogical to suggest that the States, in creating the Union, retained immunity in the courts but surrendered it with respect to federal administrative agencies.

ARGUMENT

CONSTITUTIONAL PRINCIPLES OF SOVEREIGN IMMUNITY PROHIBIT CONGRESS FROM SUBJECTING STATE AGENCIES TO CLAIMS BY PRIVATE PERSONS IN FEDERAL ADMINISTRATIVE TRIBUNALS

As an initial matter, it is important to recognize what this case does not involve. Contrary to the Federal Maritime Commission's order, its ALJ's conclusion that the Commission cannot "disregard the 11th Amendment or its related doctrine of State immunity from *private* suits" and adjudicate a reparations proceeding initiated by a private party against a state entity, Pet. App. 59a, would not "nullify the Commission's jurisdiction over state ports." *Id.* at 33a. Indeed, as

the ALJ pointed out, the Commission retains substantial means for obtaining state compliance with the requirements of federal law "other than [adjudicating] private complaints," including the power to conduct its own formal investigation, *see id.* at 60a, and seek injunctive relief in federal district court. 46 U.S.C. App. § 1710(h)(1). This case thus involves only the validity of the Commission's assertion of jurisdiction to adjudicate privately prosecuted complaints seeking monetary and prospective relief against an unconsenting State.

As explained below, even though the proceeding is litigated before an administrative tribunal, it nonetheless substantially implicates the core purposes of sovereign immunity. It disregards the dignitary interests of the States as co-sovereigns in the federal system, subjects them to coercive federal process, and exposes the States to liability for money damages. That the tribunal is placed within the executive branch does not address any of these fundamental concerns. While the Commission lacks the power to hold parties in contempt, it retains significant coercive powers which a State's officials disregard at substantial peril. As the court of appeals recognized, the contention of the United States and the Commission that Congress can subject unconsenting States to a private party "cause of action" for money damages in non-Article III tribunals is nothing less than an "end run around the Constitution." Pet. App. 13a. The judgment of the court of appeals should therefore be affirmed.

I. THE PURPOSES OF THE STATES' CONSTITUTIONAL IMMUNITY FROM SUIT APPLY FULLY TO CLAIMS LITIGATED IN ADMINISTRATIVE TRIBUNALS

This Court has held that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713

(1999). Rather, the States' immunity from suits initiated by private parties derives from two features of the Constitution's structure and design. First, the constitutional plan recognizes that the States are sovereign entities that exercise "a substantial portion of the Nation's primary sovereignty," and possess "the dignity and essential attributes inhering in that status." *Id.* at 714. Second, "even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of 'the concept of a central government that would act upon and through the States' in favor of 'a system in which the State and Federal Governments would exercise concurrent authority over the people.'" *Id.* (citation omitted).

Consistent with this understanding, the Court has repeatedly explained:

> "we cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. . . . There is . . . the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention.'"

Blatchford v. Native Village of Noatak, 501 U.S. 775, 781 (1991) (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934) (quoting Alexander Hamilton, The Federalist, No. 81)). And the Court has more recently reaffirmed that "the Constitution's structure, its history, and the authoritative interpretations by this Court make clear [that] the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of

the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional amendments." *Alden*, 527 U.S. at 713.[2]

For more than a century, the Court has accordingly recognized "a 'presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the constitution was adopted.'" *Alden*, 527 U.S. at 727 (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)). The Eleventh Amendment was drafted to overrule the Court's decision in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *See Alden*, 527 U.S. at 720-723; *Ex parte New York*, 256 U.S. 490, 497-98 (1921). As *Alden* explained, "[t]he text reflects the historical context and the congressional objective in endorsing the Amendment for ratification. Congress chose not to enact language codifying the traditional understanding of sovereign immunity but rather to address the specific provisions of the Constitution that had . . . formed the basis for the *Chisolm* decision." 527 U.S. at 723; *see also Ex parte New York*, 256 U.S. at 498. As the *Alden* Court further observed, "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits. As the Amendment clarified the only provisions

[2] As Alexander Hamilton wrote:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . .

The Federalist No. 81, at 487 (C. Rossiter ed. 1961) (quoted in *Alden*, 527 U.S. at 716-17).

of the Constitution that anyone had suggested might support a contrary understanding, there was no reason to draft with a broader brush." 527 U.S. at 724.

Thus, notwithstanding the literal text of the Eleventh Amendment, the Court has held that the States' constitutional immunity from suit prohibits citizens from suing their own State. *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). The immunity also bars a suit against a State brought by a federal corporation, *Smith v. Reeves*, 178 U.S. 436, 448 (1900), a foreign nation, *Principality of Monaco*, 292 U.S. at 330, and an Indian tribe. *Blatchford*, 501 U.S. at 782. The Court has further held that the State's immunity bars proceedings in admiralty notwithstanding the Eleventh Amendment's reference to "suits in law or equity." *See Ex parte New York*, 256 U.S. at 497-501. And in *Alden*, the Court rejected as "ahistorical literalism" an approach which, relying on the Amendment's reference to "[t]he Judicial power of the United States," attempted to limit the scope of the States' immunity from private party suits for money damages to the federal courts alone. 527 U.S. at 730.

In *Alden*, the Court reiterated that Congress lacks power under Article I to subject States to suits for money damages in their own courts. *See id.* at 730-754. There the Court explained that the "bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit." *Id.* at 736. Turning to the question of whether Congress has power under Article I to abrogate the States' immunity from suit, the Court provided numerous reasons why such suits are not "consistent with the structure of the Constitution." *Id.* at 748. As *Alden* states, "[a]lthough the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Id.*

Central to the Court's reasoning was its conclusion that such suits would nullify the core protections of sovereign immunity. As the Court observed, "[t]he founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" *Id.* (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). "The very object and purpose" of the States' sovereign immunity is "to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *In re Ayers*, 123 U.S. at 505. *Accord Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (quoting *In re Ayers*, 123 U.S. at 505); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (state sovereign immunity "is designed to protect" the "dignity and respect" owed the States as members of the Union).

"The principle of sovereign immunity preserved by [the] constitutional design 'thus accords the States the respect owed them as members of the federation.'" *Alden*, 527 U.S. at 748-49 (quoting *Puerto Rico Aqueduct*, 506 U.S. at 146). And because the States' constitutional immunity is an "immunity from suit," *see, e.g.*, *Alden*, 527 U.S. at 748-50, 754, its protections are violated whenever a State is forced into litigation by private parties "regardless of the forum." *Id.* at 749; *see also Puerto Rico Aqueduct*, 506 U.S. at 146 n.5 (The States' immunity "is concerned not only with the States' ability to withstand suit, but with their privilege not to be sued.").

The other principal purpose of sovereign immunity doctrine is protecting the States' fiscal integrity. As *Alden* explains, "[p]rivate suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States." 527 U.S. at 750. Protecting the States from suits over their war debts was a major concern

of the framers.[3] "Even today, an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages could create staggering burdens, giving Congress a power and leverage over the States that is not contemplated by our constitutional design." *Alden*, 527 U.S. at 750.

As the Court further observed, "[a] general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." *Id.* at 750-51. "[T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process." *Id.* at 751. A State cannot possibly provide full redress of every call on the State's resources, whether it be the "legitimate claim" of a judgment creditor or the demands of political constituencies. *Id.* As the Court concluded, "[i]f the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen." *Id.*

The Commission proceeding at issue in this case raises this concern in the most fundamental way. Here, the complaining party sued the State before the Commission seeking, *inter alia*, money damages, interest and attorney's fees challenging the public policy of the State regarding gambling. Even more so than when competing claimants make legitimate demands on the State's resources, this type of case raises the disturbing

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[3] *See* Alexander Hamilton, The Federalist No. 81, at 488 (C. Rossiter ed. 1961). As Hamilton wrote, "there is no color to pretend that the State governments would, by adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith." *Id.*

possibility of a federal tribunal issuing an order overriding the considered policy choice made by the State's citizens through the political process. Indeed, the threat of substantial monetary liability might well prompt a State's officials to discard state policy rather than risk incurring a substantial financial obligation.

II. CONSTITUTIONAL PRINCIPLES OF STATE SOVEREIGN IMMUNITY BAR THE FEDERAL MARITIME COMMISSION FROM ADJUDICATING A PRIVATE PARTY CAUSE OF ACTION AGAINST A STATE

The South Carolina State Ports Authority is an arm of the State of South Carolina and is thus entitled to the full protection of South Carolina's constitutional immunity from suits by private parties. *See Ristow v. South Carolina Ports Auth.*, 58 F.3d 1051, 1054-55 (4th Cir. 1995); *see also Mt. Healthy Bd. of Ed. v. Doyle*, 429 U.S. 274, 280-81 (1977). Notwithstanding that the Federal Maritime Commission retains substantial powers to obtain the Authority's compliance with federal law, *see* discussion *supra* at 6, both the Commission and the United States seek a sweeping expansion of federal power which would effectively eviscerate this Court's decision in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

As explained below, the various reasons offered by the Commission and the United States for denying the Authority the protection of its constitutional immunity in a privately prosecuted complaint proceeding amount to the same "ahistorical literalism" which the Court has repeatedly rejected. *Alden*, 527 U.S. at 730. Moreover, a privately prosecuted complaint brought before the Commission is just as offensive to the States' dignitary interests and as much a threat to the State's fiscal integrity as a suit brought in federal court. The judgment of the court of appeals should therefore be affirmed.

1. The United States and the Commission formalistically contend that a privately initiated and prosecuted complaint proceeding before the Commission "is not a suit in law or equity," and is thus outside the scope of the protections of the States' constitutional immunity. FMC Br. 23, *see* also U.S. Br. 15-17. The Commission finds it "significant that the [Eleventh] Amendment specifically uses the word 'suit,' as opposed to 'proceeding' or 'cause of action,' because it thereby confirms state immunity in terms limited to the meaning of 'suit,' and that meaning does not extend to the type of adjudication heard by the Commission." FMC Br. 23. The United States repeats the argument, stating that "[t]he Amendment's reference to 'judicial Power,' and to any 'suit in law or equity' clearly mark it as an immunity from judicial process. The term 'suit' has traditionally been used in reference to court proceedings . . . [and] has not historically encompassed administrative adjudications." U.S. Br. 15-16.

These arguments disregard that the Eleventh Amendment's text merely "reflects the historical context and the congressional objective in endorsing the Amendment for ratification." *Alden*, 527 U.S. at 723. The Court has made clear, however, that the Amendment only "address[es] the specific provisions of the Constitution that had . . . formed the basis of the Chisolm decision," *id.*, and thus "the bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit." *Id.* at 736; *see also Ex parte New York*, 256 U.S. at 497-98. Most significantly, the arguments ignore that a private complaint proceeding violates the fundamental purposes of sovereign immunity regardless of whether the case is litigated in a court or before an administrative tribunal.

Indeed, the United States' contention is belied by its own frequent assertion that its sovereign immunity protects it from claims which are litigated in administrative adjudications. *See, e.g., Ardestani v. INS*, 502 U.S. 129 (1991); *Hensel v. Office of Chief Administrative Hearing Officer*,

38 F.3d 505 (10th Cir. 1994), *see also* Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Employment Practices, Op. Off. Legal Counsel (Aug. 17, 1992) (available at http://www.usdoj.gov/olc/immigrat.21.htm). In *Ardestani*, the Court upheld the United States' contention that a deportation proceeding was not within the scope of the Equal Access to Justice Act, 5 U.S.C. § 504 & 28 U.S.C. § 2412, on the ground that the statute "renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity" which "must be strictly construed in favor of the United States." 502 U.S. at 137.[4]

In *Hensel*, the United States successfully asserted that its sovereign immunity barred an administrative claim brought under the anti-discrimination provisions of the Immigration Reform and Control Act, 8 U.S.C. § 1324b. *See* 38 F.3d at 506, 509-510; *see also id.* at 507 ("Respondent[] ha[s] raised a preliminary jurisdictional question of immunity and we must first determine whether [the U.S. Department of Veterans Affairs] is *protected from suit* by the principles of sovereign immunity . . . .") (emphasis added). Observing that "sovereign immunity protects the United States against judgments that would require an expenditure from public funds, that interfere with public administration or that would 'restrain the Government from acting, or compel it to act,'" the Tenth Circuit held that "[t]he ALJ lacked jurisdiction to hear Petitioner's claim[] against" the Department of Veterans Affairs which is "protected by the doctrine[] of . . . sovereign immunity." *Id.* at 509-10 (quoting *Dugan v. Rank*, 372 U.S.

[4] Claims for attorney's fees under the statute are litigated before the "adjudicative officer of the agency" who presided over the underlying proceeding. 5 U.S.C. § 504(a)(1) & (b)(1)(D). Judicial review of the fee determination is by appeal "to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication," *id.* § 504(c)(2), and thus frequently occurs as a petition for review in the court of appeals.

609, 620 (1963) (quoting *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 704 (1949))). *See also* OLC Op., at 3 ("Enforcement of the Antidiscrimination Provision against the federal government plainly would implicate the sovereign immunity of the United States. . . . The Antidiscrimination Provision authorizes ALJs to enter an order awarding back pay, which would expend itself on the Treasury, or an order requiring the hiring of individuals, which would restrain the United States Government from acting or compel it to act.").

The United States thus seeks to deny the States the same sovereign privilege which it asserts. *Cf. College Savings Bank v. Florida Prepaid Postsec. Ed. Exp. Bd.*, 527 U.S. 666, 682 (1999) (applying "the 'settled proposition' that the United States' waiver of sovereign immunity 'cannot be implied'" to state sovereign immunity case, "see[ing] no reason why the rule should be different with respect to state sovereign immunity") (other citations omitted); *cf. Alden*, 527 U.S. at 750 (noting "reluctan[ce] to conclude that the States are not entitled to a reciprocal privilege" to that of the federal government's immunity from suit in its own courts). The United States and the Commission, however, offer no compelling "reason why the rule should be different with respect to state sovereign immunity." *College Savings Bank*, 527 U.S. at 682.

2. Notwithstanding that the Court has repeatedly rejected as "ahistorical literalism" the United States' and the Commission's rigid textual approach, the United States urges that "[t]he term 'suit' has traditionally been used with reference to court proceedings." U.S. Br. 15 (citing *Weston v. City of Charleston*, 27 U.S. (2 Pet.) 449 (1829) & *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821)); *see also* FMC Br. at 23 (citing *Cohens*). Both cases, however, predate the emergence of the modern administrative state and thus provide no proof—let alone compelling evidence—that the States, in

creating the Constitution, knowingly and voluntarily surrendered their sovereign immunity with respect to claims adjudicated by federal agencies.

Quite remarkably, the United States and the Commission invoke *Upshur County v. Rich*, 135 U.S. 467 (1890), as establishing that the term "suit" does not "encompass[] administrative adjudications," U.S. Br. 16, and that "the exercise of judicial power is necessary for a proceeding to properly be considered a suit." FMC Br. 23. The proceeding at issue in *Upshur County*, however, did not possess the attributes of a lawsuit. Rather, the proceeding involved an application for correction of a tax assessment on the ground of excessive valuation. *See* 135 U.S. at 467-68. The Court held that because the county court was "only authorized to determine questions of quantity, proportion, and value," the taxpayers' appeal "is not a suit." *Id.* at 477. The Court further stated, however, "that such an appeal may become a suit, if made to a court or *tribunal having power to determine questions of law and fact*, either with or without a jury, and *there are parties litigant to contest the case on the one side and the other*." *Id.* (emphasis added). The Court's opinion thus refutes the formalistic notions that the term suit "has not historically encompassed administrative adjudications," U.S. Br. 16, or "extend[ed] to the type of adjudication heard by the Commission." FMC Br. 23.

More recently, the Court rejected the contention by a federal instrumentality that a "sue and be sued" clause waiving its sovereign immunity did not extend to an administrative process issued by a state agency. *Franchise Tax Bd. of Cal. v. United States Postal Serv.*, 467 U.S. 512, 523-25 (1984). In *Franchise Tax Board*, the Postal Service refused to comply with administrative orders directing it to withhold delinquent taxes owed by several employees. *Id.* at 514. The Board then filed suit in federal court to require the Postal Service to comply with the orders. *Id.*

Before this Court, the Postal Service argued "that although it must obey a judicial order, it retains sovereign immunity with respect to state administrative tax levies" and "that while the provision that the . . . Service can 'sue and be sued in its official name' waives immunity from suit, it does not apply to administrative proceedings." *Id.* at 516. In the Postal Service's view, the statute limited the waiver of sovereign immunity "to cases in which it has been 'sued,' and . . . that because the process that has issued here is that of an administrative agency rather than a court, the Service ha[d] not been 'sued.'" *Id.* at 521.

The Court rejected the argument, describing it as a "crabbed construction" and "illogical." *Id.* at 521-22. According to the Court, the administrative assessment "operate[d] in a way that is functionally indistinguishable from the judgment of a court of law" as "it creates an absolute legal obligation to make payment by a date certain," which the taxpayers could not dispute until they paid the tax and filed a refund suit. *Id.* at 523. Noting the "'incoherence'" of "distinguish[ing] between administrative and judicial process," the Court held that the clause waived the United States' sovereign immunity. *Id.* at 524 (citation omitted). As the Court concluded, "when administrative process of the type employed by the Board issues against the Postal Service, it has been 'sued' . . . and must respond to that process." *Id.* at 525.

As the foregoing demonstrates, the word "suit" is a generic term which encompasses more than just court proceedings and includes the Federal Maritime Commission's private party complaint procedure. Indeed, in the provision of the Shipping Act which creates the right to reparations, Congress itself described the right as a "cause of action." 46 U.S.C. App. § 1710(g). Contrary to the Commission's semantic contention that the term "suit" has a different meaning than "cause of action," *see* FMC Br. 23, the terms are in fact

synonymous. *See Black's Law Dictionary* 221 (6th ed. 1990) (defining "cause of action" as "[t]he fact or facts which give a person a right to judicial redress or relief against another" and "[a] situation or state of facts which would entitle party to sustain action and give him right to seek a judicial remedy in his behalf").

Indeed, both the statute creating the right and the Commission's regulations establish that the proceeding is a lawsuit for all intents and purposes. The reparations "cause of action" is subject to a three year statute of limitations and provides for the recovery of damages for "actual injury . . . includ[ing] the loss of interest at commercial rates compounded from the date of injury . . . plus reasonable attorney's fees." 46 U.S.C. App. § 1710(g). The imposition of monetary liability is thus a potential outcome—if not the primary purpose—of the proceeding.

Moreover, the Commission's regulations establish that a private complainant and the ALJ who presides over the case have a wide range of coercive process available. Indeed, under the Commission's rules—which frequently borrow verbatim from the Federal Rules of Civil Procedure—the case is litigated in essentially the same manner as any other federal lawsuit.

The "[p]roceedings are commenced by the filing of a complaint," 46 C.F.R. § 502.61(a), which "must be verified" and contain "a concise statement of the cause of action, and a request for the relief or other affirmative action sought." *Id.* § 502.62(a); *Cf.* Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court.") & *id.* R. 8(a) ("A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief, and . . . a demand for judgment for the relief the pleader seeks."); *see also* FMC Complaint Form, Exhibit No. 1 To Subpart E [§ 502.62].

Thereafter the case is assigned to an administrative law judge, *see* 46 C.F.R. § 502.146, who is subject to disqualification for "personal bias," *id.* § 502.149, and who "may not . . .be . . subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for" the Commission. 5 U.S.C. § 554(d) & (d)(2). The ALJ is given a wide range of powers over the parties and the case, including the power to "direct witnesses to testify or produce evidence" and the power to "exclude any person from a hearing for disrespectful, disorderly, or contumacious language or conduct." 46 C.F.R. § 502.147(a).[5]

The respondent must file "an answer to the complaint and . . . serve it on the complainant . . . within twenty (20) days after the date of service of the complaint." 46 C.F.R. § 502.64(a). The "answer shall give notice of issues *controverted in fact or law*." *Id.* (emphasis added). Moreover, "[r]ecitals of material . . . facts in a complaint . . . unless specifically denied in the answer thereto" are "deemed admitted as true." *Id.*; *see also* FMC Answer to Complaint Form, Exhibit 2 To Subpart E [§ 502.64]. The respondent may also file "a counter-complaint," *id.* § 502.64(d), or a motion "for a more definite statement." *Id.* § 502.71. *Cf.* Fed. R. Civ. P. 12(a)(1)(a) (requiring filing of answer "within 20 days after being served with the summons and complaint") & (e) (authorizing a party to "move for a more definite

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[5] As the Court observed in *Butz v. Economou*, 438 U.S. 478, 513 (1978), where it held that administrative law judges are entitled to absolute immunity in the same manner as Article III judges, "[t]he conflicts which federal hearing examiners seek to resolve are every bit as fractious as those which come to court." As the Court further explained, "the role of the modern federal hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions." *Id.*

statement"); *see also id.* R. 8(d) ("Averments in a pleading to which a responsive pleading is required . . . are admitted when not denied in the responsive pleading."). In the event that a respondent "fail[s] to file and serve the answer within the time provided, the [ALJ] may enter such rule or order as may be just." 46 C.F.R. § 502.64(b). *Cf.* Fed. R. Civ. P. 55.

Like Fed. R. Civ. P. 16, the Commission's rules provide for a "prehearing conference" for "the purpose of considering any settlement," as well as to consider the "[s]implification of the issues," "[t]he necessity or desirability of amendments to the pleadings," and "[t]he possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof." 46 C.F.R. § 502.94(a)(1). The Commission's rules provide for a wide range of discovery, including depositions, interrogatories, requests for production of documents, requests for admissions, *see id.* §§ 502.201-207, and various sanctions for "failure to comply" with discovery orders. *Id.* § 502.210(a); *cf.* Fed. R. Civ. P. 37(b). These sanctions include deeming facts "to be established," prohibiting "the disobedient party [from] support[ing] or oppos[ing] desiginated claims or defenses," "striking out pleadings or parts thereof," "dismissing the action," "or rendering a judgement by default against the disobedient party." *Id.* § 502.210(a)(1)-(3); *cf.* Fed. R. Civ. P. 37(b)(2).

The Commission's rules further allow any party to request that the ALJ issue a subpoena to compel either the testimony of a witness or the production of documents. *See* 46 C.F.R. § 502.131; *cf.* Fed. R. Civ. P. 45. "[T]he person to whom the subpena is directed" may move "to quash or modify the subpena." 46 C.F.R. § 502.132(a); *cf.* Fed. R. Civ. P. 45(c)(3)(A).

Finally, "at the close of testimony" the ALJ may order "[o]ral argument." 46 C.F.R. § 502.164. The parties file initial briefs which "shall be served upon all parties" and which "shall contain . . . proposed findings of fact in serially

numbered paragraphs with reference to exhibit numbers and pages of the transcript, . . . argument based upon principles of law with appropriate citations of the authorities relied upon, and . . . conclusions." *Id.* § 502.221(b) & (d). The ALJ then issues a decision which must "include a statement of findings and conclusions, as well as the reasons or basis therefor, upon all the material issues presented on the record, and the appropriate rule, order, sanction, relief, or denial thereof." *Id.* § 502.223; *cf.* Fed. R. Civ. P. 52. Thereafter, a "party may file a memorandum excepting to any conclusions, findings, or statements contained in such decision, and a brief in support of such memorandum," and an "adverse party may file and serve a reply to such exceptions." 46 C.F.R. § 502.227(a)(1) & (2). The Commission even has two sets of rules pertaining to its adjudication of small claims. *Id.* §§ 502.301-502.305; 502.311-502.321.

As the forgoing demonstrates, the Commission's assertion that "[a] private cause of action . . . brought before an administrative agency . . . is in many respects more analogous to a Federal [agency] investigation than it is to a suit brought by a private party before a Federal or state court," FMC Br. 24 (quoting Pet. App. 34a), "is too extravagant to be maintained." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179 (1803). The private party does not simply file the complaint and stand by while the Commission conducts an investigation; rather, it retains full responsibility for prosecuting a cause of action that bears almost every attribute of litigation conducted in a federal district court. As the court of appeals recognized, "[t]he proceeding . . . walks, talks, and squawks very much like a lawsuit. Its placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication." *Id.* at 15a.

3. The United States and the Commission both downplay the fact that the purpose of the private complaint proceeding is to impose a monetary liability on the respondent and that the complainant is given authority under the Commission's

rules to use a full range of coercive process. Instead, they point to the Commission's lack of power to award execution, *see* Br. U.S. 18-19, or to compel obedience to its orders by holding a disobedient party in contempt, *see id.* at 19-21; *see also* FMC Br. 21-23, suggesting that the absence of such power renders the proceedings less of an affront to the States' dignitary interests or threat to the State's fisc. This argument fails on several counts.

First, the protection of sovereign immunity does not apply only in those forums that have authority to enforce their own orders or hold a party in contempt. Taken to its logical conclusion, the views of the United States and the Commission would allow Congress to subject a State to suit in an inferior court as long as that court lacked the power to award an enforceable judgment. Congress could, for example, subject States to litigation over moral claims. *See, e.g.*, 28 U.S.C. § 2509(a) (providing for Claims Court jurisdiction over reference proceedings). But it has always been understood that a claimant cannot bring a proceeding to establish the validity of such a claim absent government consent. *Cf. Ex parte Bakelite Corp.*, 279 U.S. 438, 453-54 (1929) (noting that "[t]he government cannot be sued, except with its own consent" and that Congress required the former Court of Claims "to give merely advisory decisions on many matters").

Second, the United States has routinely asserted that its sovereign immunity bars claims against it which are litigated in administrative proceedings. *See* discussion *supra* at 13-15. For example, an ALJ who awards a prevailing party attorney's fees under the EAJA lacks authority to award execution or to hold the agency in contempt if it fails to pay. No court has ever held, however, that the federal government is barred from raising a sovereign immunity defense in an administrative proceeding because the order, in the event the officials refuse to pay, can only be enforced by a federal court. *See, e.g., Ardestani*, 502 U.S. at 137; *see also Johansen v. United States*, 343 U.S. 427, 439 (1952)

(describing Federal Employee Compensation Act, now codified at 5 U.S.C. §§ 8101-8152, which is administered by the Secretary of Labor and provides for the award of monetary relief, as "a legislative breach in the wall of sovereign immunity to damages claims").

Most important, the argument ignores the significant consequences which attach when a party disregards either a process issued under the authority of the Commission's rules or the Commission's own orders. A party which fails to answer a complaint risks the entry of an order finding it in default. *See* 46 C.F.R. § 502.64(b). A party which fails to comply with a Commission subpena or other discovery order subjects itself to a wide range of sanctions including, *inter alia*, an order deeming facts to be admitted, disallowing defenses, drawing adverse inferences, and even entering "a judgement by default." *Id.* § 502.210(a). Furthermore, a party which fails to respond to a subpoena or discovery order risks being hauled by the Attorney General before the federal district court. *See* 46 U.S.C. App. § 1713. Finally, Congress has granted the Commission the power to assess a civil penalty of up to "$25,000 for each violation" of a Commission order with "[e]ach day of a continuing violation constitut[ing] a separate offense." 46 U.S.C. App. § 1712(a). Unlike a reparations order which can only be enforced by the complainant, *see* U.S. Br. 6, a civil penalty assessment can be enforced by the United States and the court is required to enforce the order "unless it finds that the order was not regularly made or duly issued." *See* 46 U.S.C. App. § 1712(e).

In light of the foregoing, it is irrelevant whether a private party can bring an action in federal district court to enforce an FMC order directing that a State pay reparations, a point on which the United States and the Commission disagree. *Compare* U.S. Br. 21 (asserting that state sovereign immunity would bar a private suit to enforce a reparations award) *with*

Pet. App. 36a (Commission asserts that a suit to enforce a reparations order is "not an original *suit* against a state entity implicating Article III jurisdictional authority, but instead, like Hobbs Act review in the court of appeals, is court *review* of a Federal agency's order").[6] While the Commission cannot direct its enforcement staff to levy on the State's property, it can subject the State to substantial monetary penalties if it does not comply with a reparations order. Moreover, the Attorney General's subsequent suit in federal district court to enforce the Commission's assessment of a civil penalty against a State is not barred by sovereign immunity. *See, e.g.*, *Alden*, 527 U.S. at 755-56, *United States v. Texas*, 143 U.S. 621, 644-45 (1892). A State thus faces the Hobson's choice of paying either reparations or civil penalties which accumulate on a daily basis.

It is thus erroneous to suggest that the FMC's adjudication of liability "does not pose the same threat to the State's financial integrity as a comparable exercise of jurisdiction by a federal court." U.S. Br. 21. To the contrary, it can be a *greater* threat because a State's potential liability for civil

[6] The Commission tortuously concludes that a federal district court action to enforce a reparations award is not a suit subject to the Eleventh Amendment because the agency's findings are subject to deferential review, which "like Hobbs Act review in the courts of appeals, is court *review* of a Federal agency's order." Pet. App. 36a. The district courts, however, "routinely conduct deferential review pursuant to their original jurisdiction over federal questions, including on-the-record review of federal administrative action." *City of Chicago v. International College of Surgeons*, 522 U.S. 156; 171 (1997). Deferential review of the Commission's findings and conclusions does not make such an action any less a suit. It does, however, further point to the coercive nature of the proceeding because a party which fails to respond to the complaint cannot subsequently relitigate the facts in the district court.

penalties could rapidly exceed its liability for reparations. Under such circumstances, a State's officials have no practical choice but to pay the reparations award.[7]

As the respondent party in a private complaint proceeding, a state agency is not free to disregard the Commission's process or orders. Rather, a state agency is subject to sanctions designed to coerce compliance at every stage of the litigation. Moreover, refusing to obey the Commission's orders has great political ramifications both within and without the State. Not only would such an act engender great public criticism, "a state offends an agency that has plenary jurisdiction over its ports at its own peril." Pet. App. 17a (opinion of court of appeals). Indeed, a state agency has a manifest incentive to maintain good relations with the federal officials who regulate it. The FMC's private complaint proceeding is thus just as much an affront to the State's sovereignty and threat to its fiscal integrity as a case litigated in federal district court.

4. The Commission asserts that the State should be denied immunity because the litigation occurs in an Article II agency, which unlike a federal court, has a "program interest" in administering a statutory scheme and "does not have an

[7] Even if a State's refusal to comply with a reparations order were not grounds for a civil penalty assessment, the complaint proceeding would still violate the State's immunity. The immunity is not simply a defense to damages liability; "it also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Seminole Tribe*, 517 U.S. at 58 (quoting *Puerto Rico Aqueduct*, 506 U.S. at 146). Moreover, absent waiver, sovereign immunity bars a proceeding even if it would establish only that the sovereign has a moral obligation to pay. *See, e.g., Mizokami v. United States*, 414 F.2d 1375, 1377 (Ct. Cl. 1969). For example, a party with a moral or equitable claim against the United States is nonetheless barred from litigating that claim absent a congressional reference to the Court of Federal Claims. *See* 28 U.S.C. § 2509(a); *Mizokami*, 414 F.2d at 1377, 1379.

exclusively judicial role." FMC Br. 21, 22; *see also* U.S. Br. 22-24 (discussing differing roles of courts and agencies). The argument, however, actually buttresses the State's position.

Without question, an agency cannot be expected to predict in advance every problem that may arise in the course of administering a statutory scheme. The Court has thus recognized as a general matter that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). The Court has further held that an agency has broad discretion to "'adapt [its] rules and policies to the demands of changing circumstances.'" *Rust v. Sullivan*, 500 U.S. 173, 187 (1991) (quoting *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (other citation and internal quotation omitted)); *see also Chevron, Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The FMC is thus not bound to follow its own precedents in an adjudication in the same way a district court is required to adhere to case law under principles of *stare decisis*.

While civil litigation in the courts can raise the possibility of unpredictable retroactive liability, the Commission's assertion of jurisdiction over privately prosecuted complaints seeking reparations raises a much greater risk of unpredictable monetary liability. As the Commission explains, its "interpretations of the Shipping Act shape the continuing development of the standards applicable to the shipping industry by determining . . . what constitutes an 'unreasonable preference' or an 'unreasonable prejudice.'" FMC Br. 25 (quoting 46 U.S.C. App. § 1709(d)(4)). Put another way, these inherently ambiguous standards are likely to mean one thing to one set of Commissioners and another thing to a different set.

The need for sovereign immunity is therefore even greater in the context of federal agency adjudication than it is in the courts. It is thus simply illogical to suggest, as the Commission and United States do, that the States, in creating the Union, retained immunity in the courts but surrendered it with respect to federal administrative agencies. *See, e.g.*, FMC Br. 25-27. As the court of appeals observed, "would the founders have countenanced a system by which Congress could have avoided all the strictures of sovereign immunity by creating different tribunals where state sovereign immunity was completely inapplicable? To ask the question is to answer it." Pet. App. 12a-13a.[8]

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[8] Both the Commission and the United States make the ahistorical argument that because the administrative adjudication of a private complaint proceeding under the Shipping Act involves a "public right," which is properly committed to a non-Article III tribunal, sovereign immunity does not apply. *See* FMC Br. 34-41; U.S. Br. 17-18. That a "public right" can be adjudicated by an administrative tribunal without running afoul of Article III does not, however, establish that a State's sovereign immunity defense is foreclosed. Indeed, other than with respect to the Seventh Amendment right to a jury trial, which is clearly limited to suits at common law, the Court has never held that a federal agency adjudicating a public right is free to disregard other constitutional rights.

Furthermore, while the judicial conception of "a public right" has grown substantially from claims against the United States to include claims against a private party, *compare Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856), *with Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568 (1985), the Commission and the United States overlook the fact that the framers' conception of a public right was limited to claims created by the United States against itself and did not include claims created by Congress against private parties or the States. The "effective waiver of a constitutional right [requires] the 'intentional relinquishment or abandonment of a known right or privilege.'" *College Savings Bank*, 527 U.S. at 682 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). It is thus erroneous to suggest that the States surrendered, as part of the plan of the convention, their immunity from "public rights" claims when brought in a non-Article III tribunal. *See, e.g., Blatchford*, 501 U.S. at 782. Such claims did not exist at the

That the Commission's adjudication of disputes between regulated entities is "*simply one means* by which the agency fulfills the responsibility of the Executive Branch to 'take Care that the Laws be faithfully executed,'" U.S. Br. 23 (quoting U.S. Const. Art. II, § 3) (emphasis added), begs the question of why the Commission cannot utilize other less intrusive and constitutionally proper methods to obtain a State's compliance with federal law. As its own ALJ pointed out, the Commission can conduct an investigation on its own motion or "refer the allegations" to its "Bureau of Enforcement (BOE) and await BOE's recommendations." Pet. App. 60a-61a. Moreover, "[i]n connection with any investigation . . . the Commission may bring suit in a district court of the United States to enjoin conduct in violation of" the Shipping Act. 46 U.S.C. App. § 1710(h)(1). Such a suit is, of course, contemplated by the constitutional design, *see Alden*, 527

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time of the convention. Accordingly the States could not have knowingly and intelligently surrendered their immunity from them. *Cf. College Saving Bank*, 527 U.S. at 682.

The Commission's further contention that "[t]he constitutional necessity of uniformity in the regulation of maritime commerce" justifies overriding the States' immunity from suits by private parties, FMC Br. 29-33, is likewise unpersuasive. While the need for uniformity in maritime commerce led the framers to give the federal courts cognizance of "all [c]ases of admiralty and maritime [j]urisdiction," U.S. Const. Art. III, § 2, the States retained their immunity in suits in admiralty. *See Ex parte New York*, 256 U.S. 490 (1921). Moreover, agencies such as the United States Shipping Board were not even established until early in the 1900s. The federal courts were consequently the principal institution for enforcing the norms of federal maritime law. That the States retained their immunity from suits in federal admiralty courts refutes the Commission's assertion that "the Founders would not have countenanced a claim of state immunity from any aspect of the federal authority to regulate maritime commerce." FMC Br. 9. Federal maritime commerce has no higher standing in the constitutional scheme than any other form of commerce subject to federal regulation. *Cf. Seminole Tribe*, 517 U.S. at 72.

U.S. at 755-56, *United States v. Texas*, 143 U.S. 621 (1892), and does not raise the specter of unpredictable retroactive liability. The use of such procedures would likewise provide precedent for future FMC enforcement actions. *See* U.S. Br. 24.[9]

The Commission rejects this solution, asserting that it "does not have adequate resources to investigate on its own motion all possible statutory violations" because it has only "eight investigators." FMC Br. 37. The Commission's lack of resources, however, does not justify disregarding the State's immunity from privately prosecuted complaints. While the Commission may not be able to investigate all statutory violations, most allegations of violations are made against private entities and are thus capable of resolution in private complaint proceedings, where a prevailing complainant can also recover its attorney's fees. *See* Federal Maritime Commission, Formal Docket Decisions (available

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[9] The Commission asserts that even if a reparations award against a State is unenforceable, "the issuance of an order finding violations of the Shipping Act is not futile" because the decision will "serve as precedent in future complaint cases and investigations." Pet. App. 37a. But if reparations awards are not enforceable when they are issued against a State (notwithstanding the Commission's civil penalty power), it is surely arbitrary to require a State to respond to a private party's pleadings, motions, discovery requests and subpoenas. While the Commissioners might prefer this method to shield them from the political scrutiny that might attach when they or the Commission's staff conducts an investigation, the Constitution vests the executive power and the obligation to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, in Executive Branch officials and not in private individuals. *See id.* § 1. Moreover, if the Commission's process and orders are indeed unenforceable, it is difficult to understand what precedential value can be derived from a proceeding in which there can be no legal consequence to a party's failure to contest the facts. The order has no more precedential value than an agency's statement of policy, which, of course, the agency is free to reformulate at any time with or without conducting an investigation.

at http://www.fmc.gov/DOCKET.HTM). It is thus far from apparent that the Commission's resources are insufficient to allow it to investigate on its own motion (or refer to its Bureau of Enforcement) allegations of violations committed by state entities. In any event, the Commission's claim of fiscal hardship provides no warrant for overriding the States' constitutional immunity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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